

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.U., a Person Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JUSTIN C. et al.,

Defendants and Appellants.

D070236

(Super. Ct. No. NJ 14897)

APPEALS from an order of the Superior Court of San Diego County, Michael Imhoff, Commissioner. Affirmed.

Neil R. Trop, under appointment by the Court of Appeal, for Defendant and Appellant Justin C.

Jamie A. Moran, under appointment by the Court of Appeal, for Defendant and Appellant Andrew O.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Jesica Fellman, Deputy County Counsel, for Plaintiff and Respondent.

Justin C. and Andrew O. appeal from a juvenile court order denying their requests for genetic paternity testing. Andrew also contends that the San Diego Health and Human Services Agency (Agency) violated his right to due process because he was not given any notice of these proceedings until the Agency recommended termination of parental rights. We affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

In February 2014, Mother gave birth to J.U., who tested positive for marijuana and amphetamines at birth. Mother reported that J.U.'s father, Dillon M., was incarcerated until the end of the month. Mother and Dillon were homeless, used drugs together, and had been in a relationship on and off for at least four years. The Agency filed a petition on behalf of J.U. due to Mother's drug use and the long-standing substance abuse histories of both Mother and Dillon. In a parentage inquiry, Mother identified Andrew as a person other than Dillon with whom she was having sexual intercourse during the time period when she became pregnant with J.U. The same day that she signed the parentage inquiry, Mother and Dillon signed a voluntary declaration of paternity establishing Dillon as J.U.'s biological father.

At the detention hearing, the juvenile court temporarily removed J.U., elevated Dillon to presumed father status, and set a jurisdiction and disposition hearing. At the jurisdiction and disposition hearing, Dillon's attorney informed the juvenile court that Dillon had doubts regarding paternity and requested a paternity test. Dillon, however,

later withdrew his request and informed the juvenile court that he wanted to proceed as J.U.'s presumed father.

In April 2014, Mother told a social worker that there were two other possible biological fathers, Andrew and Dakota S. At that time, J.U. was living with the maternal grandmother. At the November 2015 contested six-month review hearing, neither parent was present and the juvenile court terminated services and set a Welfare and Institutions Code section 366.26<sup>1</sup> hearing. In December 2015, Mother claimed that Justin was J.U.'s father. A social worker served Justin with notice of the section 366.26 hearing later that month. In February 2016, the Agency located Andrew and Dakota. Dakota did not want to be involved in the case. In March 2016, the juvenile court amended the petition to reflect all known alleged fathers. Andrew and Justin requested paternity testing. The juvenile court ordered briefing on the paternity requests and set the matter for further hearing. In March 2016, the juvenile court denied the requests for paternity testing and set the section 366.26 hearing for trial. The juvenile court later terminated the parental rights of Mother, Dillon and all alleged fathers. Andrew and Justin timely appealed.

## DISCUSSION

### I

#### *ANDREW'S DUE PROCESS CLAIM*

Andrew contends the Agency violated his right to due process because it knew his identity as an alleged father from the time Mother completed her parentage inquiry form

---

<sup>1</sup> Undesignated statutory references are to the Welfare and Institutions Code.

in February 2014. He asserts that the Agency made no effort to locate him until the eve of the section 366.26 hearing in February 2016. Andrew claims that the failure to give him timely notice of the proceedings deprived him of the ability to contest the paternity finding and denied him custody of his son.

Three types of fathers are recognized in dependency proceedings: presumed, alleged, and biological. (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1208.) " 'Presumed father status ranks highest' " and "entitles the father to appointed counsel, custody (absent a finding of detriment), and a reunification plan." (*Id.* at p. 1209.) "Although more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity, 'there can be only one presumed father.'" (*In re Jesusa V.* (2004) 32 Cal.4th 588, 603.) A biological father is one " 'who is related to the child by blood.' " (*In re E.T.* (2013) 217 Cal.App.4th 426, 438.) A biological father is not entitled to custody of the child and cannot receive reunification services unless the court determines such services will benefit the child. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451.) " '[T]he mere existence of a biological link does not merit . . . constitutional protection' [citation]; rather, the federal Constitution protects only the parental *relationship* that the unwed father has actively developed by" coming forward to participate in the rearing of the child and acting as a father. (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1052.) "[A] *biological* father's 'desire to establish a personal relationship with [his] child, without more, is not a fundamental liberty interest protected by the due process clause.'" (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 160.)

An alleged father is not a parent and therefore not entitled to custody, reunification services or appointed counsel, except for the purpose of establishing presumed fatherhood. (*In re J.O.* (2009) 178 Cal.App.4th 139, 147.) However, the juvenile court may order services for a man determined to be the child's biological father, if the court finds that services will benefit the child. (§ 361.5, subd. (a).) Consequently, an alleged father has a due process right to notice and an opportunity to change his status to that of a biological father. (*In re J.O.*, at pp. 146-147.) " 'The statutory procedure that protects these limited due process rights is set forth in section 316.2.' " (*In re D.P.* (2015) 240 Cal.App.4th 689, 695.) This inquiry may include ordering blood tests if there has been no prior determination of paternity. (Cal. Rules of Court,<sup>2</sup> rule 5.635(e)(1) & (2).) Errors in notice do not automatically require reversal, but are subject to the harmless beyond a reasonable doubt standard of prejudice. (*In re Daniel S.* (2004) 115 Cal.App.4th 903, 912-913.)

A voluntary declaration of paternity entitles the man who signed it to presumed father status in dependency proceedings. (*In re Liam L.* (2000) 84 Cal.App.4th 739, 743-744.) Once signed and filed with the Department of Child Support Services, the voluntary declaration of paternity has the effect of a judgment and is a conclusive presumption of paternity until it is set aside. (*In re William K.* (2008) 161 Cal.App.4th 1, 7-8.) Where a voluntary declaration of paternity has been executed and filed, the court does not have a duty to determine paternity because paternity has already been

---

<sup>2</sup> Undesignated rule references are to the California Rules of Court.

established. (*In re Christopher M.*, *supra*, 113 Cal.App.4th at p. 164; rule 5.635(b) ["At the initial hearing on a petition filed under section 300 . . . and at hearings thereafter *until or unless parentage has been established*, the court must inquire . . . as to the identity and address of any and all presumed or alleged parents of the child."] (Italics added).)

Where, as here, "the issue of paternity had already been resolved by the voluntary declaration of paternity, the need to further pursue the issue through the procedures outlined in section 316.2 was obviated." (*In re Christopher M.*, at p. 164.) Accordingly, we reject Andrew's due process argument.

We acknowledge that genetic testing that establishes biological paternity in a man, other than the man who signed the voluntary declaration of paternity, may provide a basis for the court to set aside the voluntary declaration of paternity unless denial of the motion to set aside the voluntary declaration of paternity is in the best interests of the child. (Fam. Code, § 7575, subd. (b).) Thus, the juvenile court's denial of genetic testing deprived Andrew of the opportunity to establish that he was J.U.'s biological father and move to set aside the voluntary declaration of paternity. An alleged father also has a theoretical advantage from a finding of paternity as the juvenile court has discretion to offer a biological father reunification services based on a finding that services would benefit the child. (§ 361.5, subd. (a); *In re Joshua R.* (2002) 104 Cal.App.4th 1020, 1026 (*Joshua R.*)). As discussed below, even assuming Andrew could set aside the voluntary declaration of paternity based on genetic testing, he did not qualify as a presumed father and the evidence supported the juvenile court's implied finding that J.U. would not benefit from the provision of reunification services to Andrew. (Part II.B., *post.*)

Accordingly, any due process error in denying Andrew the opportunity to establish that he was J.U.'s biological father was harmless beyond a reasonable doubt.

## II

### *DENIAL OF GENETIC TESTING*

#### A. Legal Principles

When a party requests a paternity test, the juvenile court must first determine whether the issue of paternity is relevant and then must consider whether the request would pose an undue delay in the proceedings. (Fam. Code, § 7551, *Joshua R.*, *supra*, 104 Cal.App.4th at p. 1025; rule 5.635(e) [where there has been no prior determination of parentage, the juvenile court must take steps to make this determination, and has discretion to order genetic testing].) A court may set aside a voluntary declaration of paternity when court-ordered blood tests establish that the declarant is not the child's father. (*County of Los Angeles v. Sheldon P.* (2002) 102 Cal.App.4th 1337, 1340; Fam. Code, § 7575, subd. (b)(1).)

Nonetheless, even if a man's status as a biological father is established based on genetic testing, the man is not entitled to the rights or status of a presumed father because presumed fatherhood is based not on a biological connection but rather on a man's relationship with the child or the child's mother. (See Fam. Code, § 7611; *In re Emma B.* (2015) 240 Cal.App.4th 998, 1003 ["genetic testing has limited applicability in determining presumed father status"]; *Joshua R.*, *supra*, 104 Cal.App.4th at p. 1029 ["mere *biological* fatherhood, unaccompanied by a parent-child *relationship*, is worth little in the dependency context"].) Thus, even assuming a man is determined to be a

biological father based on genetic testing and is successful in setting aside a voluntary declaration of paternity, the man is not entitled to presumed father status. Rather, to become a presumed father, a man must fall within one of several categories enumerated in Family Code section 7611. (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595.)

"Under Family Code section 7611, a man who has neither legally married nor attempted to legally marry the child's natural mother cannot become a presumed father unless (1) he receives the child into his home and openly holds out the child as his natural child, or (2) both he and the natural mother execute a voluntary declaration of paternity." (*Francisco G. v. Superior Court, supra*, 91 Cal.App.4th at p. 595.) A man claiming entitlement to presumed parent status has the burden of establishing by a preponderance of the evidence the facts supporting the entitlement. (*In re J.O., supra*, 178 Cal.App.4th at p. 147.)

As we shall discuss, under the circumstances of this case, genetic testing was irrelevant because neither Andrew nor Justin qualified as a presumed father. Additionally, the record supports the juvenile court's implied conclusion that it would not have ordered reunification services even if either man could establish biological fatherhood. Thus, the juvenile court did not err in denying these men the opportunity to establish a biological connection to J.U.<sup>3</sup>

---

<sup>3</sup> Justin relies on *In re B.C.* (2012) 205 Cal.App.4th 1306 for the proposition that the biological paternity of a dependent child should be determined if requested, even if the alleged parent making the request cannot elevate his status to that of a presumed parent.

## B. Andrew

Mother signed a parental inquiry form, under penalty of perjury, listing Andrew as a person with whom she had sexual intercourse during the time period when she became pregnant with J.U. That same day, Mother signed the voluntary declaration of paternity, under penalty of perjury, swearing that Dillon, "the man [who has signed the voluntary declaration of paternity,] is the only possible father" of her child. (Fam. Code, § 7574, subd. (b)(5).) She also stated that "she was already a month and a half pregnant" when she slept with Andrew, "so he can't possibly be the father."

Mother has never been married and there is no evidence in the record that Mother ever attempted to marry Andrew. Under these circumstances, Andrew could become a presumed father only if (1) he received J.U. into his home and openly held J.U. out as his natural child, or (2) both he and the Mother executed a voluntary declaration of paternity. (Fam. Code, § 7611.) Mother did not execute a voluntary declaration of paternity with Andrew and there is no evidence that Andrew received J.U. into his home. Rather, when the Agency located Andrew he was incarcerated. When Andrew learned that he was named as an alleged father and moved to return the case to disposition, he did not file a declaration expressing any interest to commit to his parental responsibilities—emotional,

---

*In re B.C.* is distinguishable because there was no presumed father in that case, only a single alleged father. (*Id.* at p. 1309.) Thus, the holding of *In re B.C.* rested on the mandatory duty of the trial court to make a parentage determination under rule 5.635(h)(1). (*In re B.C.*, at p. 1314.) Here, a presumed father existed. Accordingly, the juvenile court was free to act pursuant to its discretionary powers to order, or not order, paternity testing under rule 5.635(e)(2). To require genetic testing in cases in which there is a presumed father would elevate form over substance.

financial, and otherwise. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 450.) At the time of the hearing on his motion, Andrew was still incarcerated.

Under the circumstances, it was impossible for Andrew to be declared a presumed father and the juvenile court could have reasonably concluded that even if Andrew was J.U.'s biological father, ordering reunification services would not have been in J.U.'s best interests. The maternal grandparents have cared for J.U. for about one year and are interested in adopting him. J.U. demonstrated a clear attachment to his caregivers, seeking out his maternal grandmother during visits with Mother, calling the maternal grandmother "Ma Ma." The grandfather works in law enforcement and "devotes his days off work spending one on one time with" J.U. On this record, any alleged error in denying Andrew the opportunity to establish biological paternity was harmless.

### C. Justin

Justin filed a declaration in support of his request for genetic testing, but did not state that he and Mother ever attempted to marry. Mother did not execute a voluntary declaration of paternity with Justin and there is no evidence that Justin received J.U. into his home. Justin stated that he saw Mother about two times a week for about a month before Mother became pregnant. Justin knew about Mother's pregnancy and knew "from the beginning of the pregnancy" that he could possibly be J.U.'s biological father. He was incarcerated in July 2015 and spent six months in prison. Justin saw J.U. once during the dependency case, when J.U. was about nine months old and Mother was on a pass from her program. In his sworn parentage inquiry form, Justin claimed that he had provided Mother with moral and some financial support for J.U. He also claimed that he

told friends and some family he might be J.U.'s father, but did not provide the names or addresses of these individuals as requested in the form. Justin's declaration in support of his motion for genetic testing indicated that he would be "thrilled to be [J.U.'s] father." He expressed no interest, however, in committing to any parental responsibilities.

On these facts, it was impossible for Justin to be declared a presumed father. The record also suggests that reunification services at this late date would not have been in J.U.'s best interests. J.U. was living with the maternal grandparents, who loved him, provided for his daily needs and wanted to adopt him. The social worker concluded "[t]here is every reason to believe that [the maternal grandparents] will be approved to adopt." Justin has a criminal history dating back to 2009. He has been out of custody since December 2015, but there is no evidence in the record suggesting he demonstrated any commitment to J.U.'s welfare after his release from custody. Rather, despite knowing that he might be J.U.'s biological father from the beginning of Mother's pregnancy, Justin never attempted to seek paternity until the Agency contacted him a few months before the section 366.26 hearing after Mother first alleged that Justin could be J.U.'s father.

The record supports an inference that, had the Agency not contacted Justin, he would not have requested genetic testing. The record also supports an inference that Mother named Justin as an alleged father as a means of delaying the section 366.26 hearing and sending the case back to disposition. Namely, she told a social worker that she named Justin as an alleged father at this point "because someone told her that if she mentioned [Justin] as a possible father that it could set her case backward to the

beginning." On this record, any error in denying Justin the opportunity to establish biological paternity was harmless.

DISPOSITION

The juvenile court's order denying paternity testing is affirmed.

---

HUFFMAN, J.

WE CONCUR:

---

McCONNELL, P. J.

---

O'ROURKE, J.